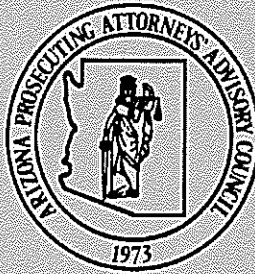


CRIMINAL YEAR SEMINAR

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STATE v. LEBRUN **STATE'S RESPONSE TO PETITION FOR REVIEW**

Presented By:

JOSEPH MAZIARZ
Assistant Attorney General
Phoenix, Arizona

Distributed By:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL

1951 W. Camelback Road, Suite 202

Phoenix, Arizona 85015

PAUL W. AHLER
EXECUTIVE DIRECTOR

ELIZABETH ORTIZ
SENIOR STAFF ATTORNEY

And

CLE WEST

2929 N. Central, Suite 1500

Phoenix, Arizona 85012

ARIZONA SUPREME COURT

STATE OF ARIZONA,

Appellee,

v.

PAUL FRANCIS LEBRUN,

Appellant.

CR-09-0213-PR

Court of Appeals

No. 1 CA-CR 06-0060

1 CA-CR 06-0468

Maricopa County

Superior Court

No. CR-2003-014270-001 DT

THE STATE OF ARIZONA'S RESPONSE

TO PETITION FOR REVIEW

Terry Goddard

Attorney General

(Firm State Bar No. 14000)

Kent E. Cattani

Chief Counsel

Capital Litigation/Criminal Appeals
Section

Robert A. Walsh

Assistant Attorney General

Criminal Appeals Section

1275 West Washington

Phoenix, Arizona 85007-2997

Telephone: (602) 542-4686

ROBERT.WALSH@AZAG.GOV

(State Bar Number 016071)

Attorneys for Appellee

I. ISSUE PRESENTED FOR REVIEW.

Whether the Arizona Court of Appeals correctly held that *State v. Aguilar*, 209 Ariz. 40 (2004), did not require an evidentiary hearing in this case because: (1) the trial court reviewed recordings of the victims' firsthand accounts of Appellant's molestations; and (2) Appellant declined the court's repeated invitations to present evidence undermining the victims' versions of events.

II. FACTS MATERIAL TO THE ISSUE PRESENTED.

The State filed four indictments that aggregately charged Appellant with eight counts of child molestation and five counts of sexual conduct with a minor, and alleged that he committed these crimes against six different boys between 1986 and 1991. *State v. LeBrun*, 213 P.3d 332, 333, ¶ 2 (Ariz.App.2009). Four men from Indiana subsequently informed the prosecution that Appellant had molested them during their boyhoods between 1979 and 1986. *Id.* at 333-34, ¶ 3. Relying upon Arizona Rule of Evidence 404(c), the State filed motions to consolidate Appellant's four cases, pursuant to Arizona Rule of Criminal Procedure 13.3(a)(1), and to admit the testimony of the "Indiana witnesses" to prove that Appellant had an aberrant propensity to commit the charged sexual offenses. (P.I., Items 22, 28, 38.)

Appellant argued that Rule 404(c)(1)(A) mandated an evidentiary hearing so that he could impeach the victims' credibility and thereafter argue that the State had not satisfied the clear-and-convincing-evidence requirement. (R.T. 10/17/03, at 18; P.I., Item 24.) The court disagreed that such a hearing was required, reviewed the transcripts of the charged victims' police interviews and the hearsay grand-jury testimony of the State's case agent, and granted the prosecution's consolidation motion. (M.E., Item 47.)

Four months later, this Court decided *Aguilar*, which prompted the trial court to revisit its consolidation ruling and also to invite Appellant to present evidence contradicting the victims' pretrial interview statements. (*Id.*, Item 55; R.T. 11/19/04, at 12-25.) Despite claiming that he had no "positive evidence" to present, Appellant maintained that *Aguilar* required the victims to testify and be cross-examined at an evidentiary hearing so that the court could assess their credibility for its Rule 404(c)(1)(A) determination. (R.T. 11/19/04, at 12-17.) The court, however, construed *Aguilar* to require evidentiary hearings for credibility assessments only when the victim and the defendant had given contradictory accounts of the alleged incident, found this condition precedent not to exist, and thus reaffirmed its prior ruling, based upon its review of the charged victims' audio and videotaped interview statements. (M.E., Item 55.)

Before ruling on the State's motion to admit the testimony of the "Indiana victims," the trial court requested the prosecution to submit the recordings of these witnesses' interview statements and also invited Appellant "to present whatever evidence it wants to try to undercut the [State's] theory of relevance," such as police reports and prior inconsistent statements by these witnesses. (R.T. 11/19/04, at 17-26; R.T. 1/14/05, at 16-17; R.T. 1/23/04, at 19-20; R.T. 11/19/04, at 15-16, 24.) Appellant again declined the court's invitation to proffer such evidence, even though he subsequently cross-examined the Indiana victims at trial with impeachment material available to him before this ruling. (R.T. 5/14/04, at 8; R.T. 5/6/05, at 3-4; Answering Brief, at 45, n.18.) Thus, the court granted the State's motion and held that an evidentiary hearing was not required, because: (1) *Aguilar*

did not explicitly require evidentiary hearings in all cases, but only when the differing accounts of the defendant and his victims required a credibility determination—a circumstance absent here because Appellant declined to relate his version; and (2) unlike *Aguilar*, which found error because the judge had “neither heard from the victims nor was presented with any testimony from them,” the court had “heard” the victims’ firsthand accounts of Appellant’s prior acts via their recorded interview statements. (M.E., Item 64.)

During trial, the court reaffirmed both challenged rulings by explicitly finding every victim’s pretrial statements to be consistent with his trial testimony, and by avowing that it would have rendered the same rulings, even if it had the benefit of Appellant’s cross-examination before trial. (See Answering Brief, at 47-48, 83.) The jury convicted Appellant on six counts, acquitted him on one child-molestation charge, and hung on the remaining counts. (M.E., Item 161.)

Affirming Appellant’s convictions in a published Opinion, the Arizona Court of Appeals rejected Appellant’s contention that *Aguilar* mandated an evidentiary hearing and prohibited consideration of the victims’ pretrial interview statements, based upon reasoning that largely paralleled the trial court’s articulated rationales. *See LeBrun*, 213 P.3d at 334-37, ¶¶ 5-17.

III. REASONS THIS COURT SHOULD DENY REVIEW.

Petitioner seeks review because he construes *Aguilar* and Rule 404(c)(1)(A) as *always* conditioning the admission of sexual-propensity evidence upon live evidentiary hearings at which *all* sex-crime victims would be compelled to submit to cross-examination, for the ostensible purpose of affording defendants the

opportunity to impeach them and convince trial judges that their proposed testimony is incredible and thus insufficient to satisfy the clear-and-convincing-evidence requirement. Nonetheless, this Court should deny review because the court of appeals properly distinguished this case from *Aguilar*. Should this Court find otherwise, it should clarify and/or overrule *Aguilar*, which is the source from which Appellant derives the following incorrect propositions: (1) judges may make witness-credibility assessments while determining satisfaction of Rule 404(c)(1)(A)'s clear-and-convincing-evidence requirement; (2) trial courts accordingly must always hold evidentiary hearings before admitting other-act evidence, pursuant to Rule 404(c), and may never rely upon traditional offers of proof short of live testimony; and (3) appellate courts may not consider the other-act evidence ultimately admitted at trial while reviewing challenges to the trial court's ruling.

A. The court of appeals correctly distinguished Aguilar.

The court of appeals properly held that Appellant was not entitled to an evidentiary hearing in this case. At the outset, the court accurately observed that Rule 404(c), like its Rule-404(b) counterpart, lacks any text explicitly requiring evidentiary hearings as condition precedent for admitting other sex-act evidence. *LeBrun*, 213 P.3d at 335-36, ¶¶ 10, 13. Additionally, the court correctly noted that *Aguilar* neither promulgates an evidentiary-hearing requirement in *all* cases, nor "categorically restricts the types of information the trial court may consider in determining the admissibility of evidence under Rule 404(c)." *Id.* at 335-36, ¶¶ 10, 13-14. Furthermore, the court of appeals accurately observed that the cause for

reversal in *Aguilar* was *not* the absence of an evidentiary hearing, but rather the trial court's incorrect decision to predicate its clear-and-convincing-evidence finding upon the defendant's admissions to having had sex with his alleged sexual-assault victims—a finding that was insufficient because it did *not* resolve the critical issue of whether these sexual contacts were non-consensual. *Id.* at 335-36, ¶¶ 11-12. In contrast, Appellant does *not* challenge the sufficiency of the trial court's findings, but rather the *nature* of the materials underlying its ruling. *Id.* at 336, ¶ 13.

The court of appeals properly construed *Aguilar* as requiring an evidentiary hearing only under that case's unique circumstances, to wit: (1) the defendant and the alleged victims had presented competing versions of the sexual assaults, the consequence of which was that the trial court could not find the lack of consent by clear and convincing evidence unless it “ma[d]e a credibility determination that the victims' accounts of the assaults were more credible than Aguilar's,” *id.* at 336, ¶ 12 (quoting *Aguilar*, 209 Ariz. at 50, ¶ 35); and (2) *Aguilar*'s trial court could not have made such a credibility-based finding because the materials it reviewed before ruling “consisted of a secondhand recitation of the competing claims on the issue of consent,” and it “neither heard from the victims nor was presented with any prior testimony from them.” *Id.*

Because neither of *Aguilar*'s unique circumstances existed here, the court of appeals correctly upheld the trial court's clear-and-convincing-evidence finding. Unlike the hearsay recitation of the victims' accounts in *Aguilar*, “the trial court [here] heard the victims' own statements and first-person accounts of what they

observed or perceived during defendant's conduct." *Id.* at 336, ¶ 15 (citing *State v. Lee (Chad)*, 189 Ariz. 590, 599 (1997)). And, "there was no material issue of fact as to the nature of the acts that the trial court had to resolve in determining admissibility," because Appellant spurned the court's invitation to "present evidence disputing the victims' statements." *Id.*¹ These distinguishing factors were also present when the trial court ruled that the "Indiana witnesses" could testify to Appellant's prior acts. *Id.* at 377, ¶ 16.

B. Appellant suffered no prejudice.

Alternatively, assuming that *Aguilar* required an evidentiary hearing to grant Appellant the opportunity to impeach his victims via cross-examination, any error was harmless because: (1) the trial court repeatedly reaffirmed both challenged rulings after hearing each and every victim give testimony subject to cross-examination at trial, and it professed its personal belief before sentencing Appellant that it personally believed the victims' accounts (Answering Brief, at 47-48, 75-76, 83, 87); (2) the record supports the trial court's clear-and-convincing-evidence findings (*id.* at 76-77, 88); (3) Appellant made no record below to memorialize how his pretrial cross-examination of the victims would have differed, both in substance and style, from the otherwise thorough cross-examination he conducted at trial (*id.* at 77-78, 87); and (4) the jury demonstrated its lack of unfair

¹ Appellant's not-guilty pleas did *not* constitute a competing version of events because: (1) his not-guilty pleas no more constituted substantive evidence of his innocence than the indictment was substantive evidence of his guilt; and (2) his pleas had no effect on the other-act evidence.

prejudice against Appellant by acquitting him on Count 10 and failing to return verdicts on six other counts (*id.* at 78, 87).

IV. WHY THIS COURT SHOULD CLARIFY AND/OR OVERRULE *AGUILAR* IF REVIEW IS GRANTED.

A. Aguilar is irreconcilable with overwhelming precedent holding that credibility is exclusively a jury question.

Based upon *Aguilar*'s statement that "the trial court had to make a credibility determination" to resolve the conflicting accounts on consent in order to find clear and convincing evidence that the defendant sexually assaulted his victims, 209 Ariz. at 50, ¶ 35, Appellant argues that Rule 404(c)(1)(A) entitled him to an evidentiary hearing so that he could cross-examine his victims and denigrate their credibility to such an extent that the trial court might personally find them incredible and their testimony inadmissible. To whatever extent *Aguilar* holds that judges may preclude testimony they personally disbelieve,² it is irreconcilable with the plain text of Rule 404(c), the Arizona Constitution, and this Court's well-established precedent holding that credibility is exclusively a jury question.

First, Rule 404(c)(1)(A) contains no text conditioning the admission of propensity evidence upon the trial judge's personal satisfaction that the proponent's

² Appellee maintains its argument below that this passage was *dicta* because: (1) it was superfluous to *Aguilar*'s holding that the trial court reversibly erred by making *no* clear-and-convincing-error determination on the consent issue; (2) this passage never expressly declared itself a guide for future conduct; and (3) *Aguilar* never explicitly overruled prior precedent holding that judges may not preclude evidence they personally find incredible or unreliable. (Answering Brief, at 68-72.)

witnesses are credible, but instead allows admission when “[t]he evidence is *sufficient to permit the trier of fact* to find that the defendant committed the other act.” (Emphasis added.) Textually analogous to the “evidence sufficient to support a finding” phraseology of Arizona Rules of Evidence 104(b) and 901(a), Rule 404(c)(1)(A)’s clear and unambiguous language is conclusive of this Court’s intent to admit evidence that *a jury* could find true by the governing standard. *See State v. Thompson*, 200 Ariz. 439, 440, ¶ 6 (2001). If this Court had intended to allow judicial credibility determinations to usurp the jury’s truth-detector role, it would have drafted Rule 404(c)(1) to condition admission explicitly upon the evidence being sufficient to convince *the judge* that the defendant committed the other act. That this Court did not do so is conclusive that it lacked such intent. *See State v. Sepahi*, 206 Ariz. 321, 324, ¶ 16 (2003).

Second, this passage in *Aguilar* cannot be squared with the fact that “[o]ur constitution preserves the ‘right to have the jury pass upon questions of fact by determining the credibility of witnesses and the weight of conflicting evidence.’” *McVey v. Logerquist*, 196 Ariz. 470, 487, ¶ 51 (2000) (quoting *Burton v. Valentine*, 60 Ariz. 518, 529 (1943)). *Cf. State v. Cox*, 217 Ariz. 353, 357, ¶ 27 (2007) (“No rule is better established than that the credibility of the witnesses and the weight and value to be given their testimony are questions exclusively for the jury.”). This constitutional prohibition against judicial usurpation of the jury’s exclusive role in determining credibility has found expression in numerous cases construing the Arizona Rules of Evidence. *See State v. Plew*, 155 Ariz. 44, 49-50 (1987) (“We recently held on a similar issue that such ‘veracity-reliability-credibility’ issues

‘traditionally fall within the province of the jury rather than the judge. We do not believe that a judge should be able to bootstrap himself into the jury box via evidentiary rules.’”) (quoting *State v. LaGrand*, 153 Ariz. 21, 28 (1987)); *State v. King*, 213 Ariz. 632, 636, ¶ 11 (App.2007) (“The judge does not determine whether the document is authentic, only whether there is some evidence from which the trier of fact could reasonably conclude that it is authentic.”); *State v. Alvarez*, 210 Ariz. 24, 28-29, ¶¶ 16-17 (App.2005) (upholding admission of excited utterance made by allegedly unreliable declarant because witness credibility is a jury question) (citing *State v. Jeffers*, 135 Ariz. 404, 420 (1983)). This rule that evidence is “admissible when a jury could reasonably believe from the evidence that the condition was fulfilled” applies with equal force to other-act evidence. *State v. Williams (Aryon)*, 183 Ariz. 368, 377-78 (1995). Accord *State v. Roscoe*, 184 Ariz. 484, 493 (1995); *State v. Romero*, 178 Ariz. 45, 51-52 (App.1993).

Furthermore, the statement in *Aguilar* requiring judges to determine witness credibility cannot be reconciled with this Court’s repeated promulgations that the standard for admitting other-act evidence is the “substantial evidence” benchmark governing directed-verdict motions—motions that trial courts *must* deny when the defendant claims that dismissal is mandated because the State’s witnesses are unworthy of belief.³ See *State v. Hall*, 204 Ariz. 442, 455, ¶ 55 (2004); *State v.*

³ “Before evidence of a prior crime may be admitted for purposes of Rule 404(b), there must be sufficient proof of that crime that it could be presented to a jury if the crime was charged.” *State v. McGann*, 132 Ariz. 296, 298 (1982) (citing *State v. Hughes*, 102 Ariz. 118, 123 (1967)). Accord *State v. Mott*, 187 Ariz. 536, 545 (1997); *State v. Fierro*, 166 Ariz. 539, 547 (1990); *State v. Valles*, 162 Ariz. 1, (continued ...)

Soto-Fong, 187 Ariz. 186, 200 (1996). In the Rule 20 context, the sufficiency of the State's evidence and the credibility of its witnesses raise distinctly separate questions. See *State v. Williams (Todd)*, 209 Ariz. 228, 231, ¶ 6 (App.2004); *State v. Lee (Roy)*, 151 Ariz. 428, 429 (App. 1986). Thus, when "substantial evidence" of guilt exists, a trial court improperly invades the jury's province by granting motions for directed verdict, based upon its own personal disbelief of the victim's testimony. *State v. Paoletto*, 133 Ariz. 412, 416 (App.1982). If judges harboring personal doubts about the victim's credibility cannot keep charges supported by substantial evidence from the jury, they accordingly lack the authority to deny the jury other-act testimony by witnesses whom they personally disbelieve. Cf. *Logerquist*, 196 Ariz. at 487, ¶ 51 ("It would be strange that a judge forbidden to comment on the reliability or credibility of testimony would be empowered to preclude the jury from hearing it at all because the judge believes it to be unreliable or not worthy of belief.").

B. Aguilar should be revisited because trial courts may find clear and convincing evidence without the victim's sworn testimony.

Aguilar stated that the trial court could not have made a valid clear-and-convincing-evidence finding because it "neither heard from the victims nor was presented with any prior testimony from them," but instead considered just the attorneys' arguments and a detective's grand-jury testimony summarizing the

(... continued)

5 (1989); *State v. Woods*, 121 Ariz. 187, 190 (1979). Cf. *State v. Terrazas*, 189 Ariz. 580, 583 (1997) (citing *Valles*, *McGann*, and *Woods* to show that *Hughes*' standard survived the promulgation of the Arizona Rules of Evidence).

victims' pretrial statements. 209 Ariz. at 50, ¶¶ 33-37. From this passage, Appellant derives the proposition that Rule 404(c)(1)(A) requires the victims to testify under oath, subject to cross-examination, and preferably before the assigned trial judge to permit assessments of the victims' credibility. This passage of *Aguilar* cannot stand uncorrected, for the following reasons.

First, Appellant's *Aguilar*-based argument that victims must give sworn testimony at an evidentiary hearing fails because its premise—judges must make witness-credibility assessments to find the clear-and-convincing-evidence standard satisfied—is incorrect, for the reasons enumerated above. Second, neither Rule 404(c)'s text nor its accompanying comment explicitly conditions the admission of other-act evidence upon the trial court's review of the victim's sworn testimony. Rule 404(c) likewise contains no provisions exempting sexual-propensity evidence from the purview of Arizona Rule of Evidence 104(a), which states that trial judges determining preliminary questions of admissibility are "not bound by the rules of evidence except those with respect to privilege." Thus, *Aguilar* incorrectly stated that the trial court could not base its Rule 404(c)(1)(A) finding upon a detective's grand-jury testimony relating the victims' hearsay accounts of the defendant's sexual assault. *See State v. Edwards*, 136 Ariz. 177, 183 (1983) ("In deciding preliminary questions involving the admissibility of evidence, the hearsay rules do not apply."); *State v. Hutchinson*, 141 Ariz. 583, 588 (App.1984) (collecting cases). Consequently, *Aguilar* exposes sex-crime victims unnecessarily to an additional round of invasive questioning about very humiliating and traumatic experiences.

Moreover, *Aguilar's* focus on witness credibility is misguided because the purpose of the sufficiency-of-the-evidence standard governing other-act evidence is to ensure "that speculative crimes incapable of being rebutted [do] not form the foundation of admissible evidence." *State v. Armstrong*, 176 Ariz. 470, 473-74 (App.1993). Trial courts do not need evidentiary hearings to expose such speculative other-act evidence because this pre-screening process may be accomplished by requiring the prosecution to submit the victims' hearsay statements—whether in the form of grand-jury transcripts, police reports, or prosecutorial avowals—and conditionally admitting this evidence subject to fulfillment of that proffer, pursuant to Rule 104(b). *See Huddleston v. U.S.*, 485 U.S. 681, 690 & n.7 (1988); *Roscoe*, 184 Ariz. at 493; *Williams (Aryon)*, 183 Ariz. at 377-78. This truism is manifested by the overwhelming weight of authority holding that trial courts may admit other-act evidence without conducting live evidentiary hearings and subjecting witnesses to defense cross-examination. *See People v. Moore*, 117 P.3d 1, 3 (Colo.App.2004); *Anderson v. U.S.*, 857 A.2d 451, 456-58 (D.C.2004); *Hall v. State*, 351 S.E.2d 236, 237 (Ga.App.1986); *State v. Parmer*, 207 P.3d 186, 190-94 (Idaho.App.2009) *State v. Kennedy*, 585 N.W.2d 385, 390 (Minn.1998); *Salgado v. State*, 968 P.2d 324, 326-27 (Nev.1998); *State v. Kilgore*, 53 P.3d 974, 977-78 (Wash.2002).

Finally, the lack of an evidentiary-hearing requirement is manifested by this Court's other-act jurisprudence, which reflects review of the evidence the State ultimately admitted *at trial*, but does not mention pretrial-hearing testimony. *See State v. Anthony*, 218 Ariz. 439, 443-45, ¶¶ 27-28, 34-37 (2008) (noting that the

trial court considered “briefing . . . and extensive oral argument” on the other-act evidence before ruling, but finding the trial evidence insufficient proof); *State v. Nordstrom*, 200 Ariz. 229, 248, ¶ 57 (2001) (upholding other-act evidence based upon several witnesses’ trial testimony); *Lee (Chad)*, 189 Ariz. at 596-97 (relating murder defendant’s post-arrest statements and subsequent trial testimony); *State v. Gulbrandson*, 184 Ariz. 46, 61 (1995) (relying on “the testimony of two witnesses who saw the previous assault”).

C. Aguilar incorrectly confined its review to the materials that the trial judge considered before ruling and ignored the trial evidence.

This Court should overrule *Aguilar* for incorrectly limiting its review to the materials that the trial judge considered when making its Rule 404(c)(1)(A) finding and improperly ignoring the trial evidence. 209 Ariz. at 50, ¶ 37. In the cases cited immediately above, this Court considered the actual trial evidence while reviewing the admission of other-act evidence. *Cf. Huddleston*, 485 U.S. at 690 (judges must consider “all the evidence in the case” when determining whether the prosecution had proven the conditional fact for admission). Moreover, appellate courts review the trial evidence to determine whether the prerequisites of Rule 404(c) have been satisfied, notwithstanding the absence of required on-the-record findings and/or pretrial hearings. *See State v. Marshall*, 197 Ariz. 496, 499-500, ¶¶ 5-7 (App.2000). *Cf. State v. Bolt*, 142 Ariz. 284, 287-88 (App.1983) (trial testimony cured improper denial of *Franks* hearing). Finally, consideration of the trial evidence is necessary to prevent reversals for non-prejudicial errors. *See Ariz.Const.Art. VI, § 27; A.R.S. § 13-3987; State v. Vasko*, 193 Ariz. 142, 147-49, ¶¶ 22-31 (App.1998).

V. CONCLUSION.

Consequently, this Court should deny review. If review is granted, this Court should revisit *Aguilar*.

RESPECTFULLY SUBMITTED this 21st day of September 2009.

TERRY GODDARD
Attorney General

/s/ Robert A. Walsh
Assistant Attorney General
Criminal Appeals Section

Attorneys for Appellee

COPIES of the foregoing were deposited for mailing
this 21st day of September 2009, to:

PEG GREEN
DEPUTY PUBLIC DEFENDER
620 W. Jackson, Suite 4015
Phoenix, AZ 85003

Attorney for APPELLANT

/s/S. House

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CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rule of Criminal Procedure 31.19(c) and (e), undersigned counsel certifies that this response to the petition for review uses a proportionately spaced typeface of 14 points, is double spaced using a Roman font, and contains **3,498** words.